IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

TUESDAY, THE 4TH SEPTEMBER 2007 / 13TH BHADRA 1929

CRL.A.No. 307 of 2002()

CRL. APPEAL NO.428 OF 2001 OF VI ADDITIONAL SESSIONS COURT, ERNAKULAM
CC.790/1997 of JUDL.MAGISTRATE OF FIRST CLASS-I, MUVATTUPUZHA

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APPELLANT: COMPLAINANT

JOSEPH JOY, ALAPPATTU HOUSE,
MUVATTUPUZHA.

BY ADVS. SRI.SHABU SREEDHARAN
SRI.BOBBY K.PAUL

RESPONDENTS: APPELLANT AND 2ND RESPONDENT/ACCUSED & STATE

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1. P.V.ANDREWS, POOVAN HOUSE,
COLLEGE ROAD, MUVATTUPUZHA.

2. STATE OF KERALA, REPRESENTED BY
THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

BY ADV. SMT.P.V.KOCHUTHRESIA-R1
PUBLIC PROSECUTOR SRI. PUZHAKKARA MOHAMMED - R2

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 04/09/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.THANKAPPAN, J.

CRL. APPEAL NO. 307 OF 2002

Dated this the 4th day of September, 2007

JUDGMENT

The conviction and sentence ordered by the trial court was challenged in Crl. Appeal No. 428 of 2001 on the file of the VI Additional Sessions Court, Ernakulam. By the judgment in C.C. No.790 of 1997 on the file of the Judicial First Class Magistrate's Court - I, Muvattupuzha, the accused, first respondent herein, was found guilty under Section 138 of the Negotiable Instruments Act, 1881, he was convicted thereunder and sentenced to undergo simple imprisonment for one month and to pay a fine of Rs.5,000/- and in default of payment of fine, to undergo simple imprisonment for a further period of 15 days. Out of the fine amount, Rs.3,000/- was ordered to be paid to the complainant, appellant herein, as compensation.

2. The case of the appellant -complainant before the trial court was that the first respondent - accused borrowed from him an amount of Rs.75,000/- on 1.7.1996 and issued Ext.P1 cheque dated 1.12.1996 and

Ext.P2 cheque dated 2.1.1997 for Rs.50,000/- and Rs.25,000/- respectively towards discharge of the above liability. It was further alleged in the complaint that when the cheques were presented to the bank for encashment, the same were returned for want of sufficient funds in the account of the accused. Though statutory notice was issued, it was not accepted and returned as unclaimed and hence, the complaint was filed. To prove the case of the complainant, the complainant himself was examined as PW.1 and another witness was examined as PW.2 and Exts.P1 to P9 were produced. On the side of the defence, the Manager of Muvattupuzha Urban Bank was examined as DW.1 and Ext.D1 was produced. On closing the evidence of the complainant, the accused was questioned under Section 313 Cr. P.C. He denied the allegations levelled against him and stated that he had borrowed only an amount of Rs.3000/- from the complainant. However, the trial court accepted the evidence adduced by the complainant and found the first respondent guilty of the offence and convicted him as aforesaid.

3. The judgment of the trial court was challenged before the lower appellate court on two grounds. Firstly, it was contended that the transaction alleged in the complaint was not correct and that Exts.P1 and P2 cheques were not issued in discharge of any liability, but only as

security. The second ground was that statutory notice under Section 138 of the Negotiable Instruments Act was not served on the accused. Accepting the case of the accused, the lower appellant court set aside the judgment of the trial court and allowed the appeal against which this appeal is preferred.

4. Heard the learned counsel appearing for the appellant and perused the records made available to this Court.

5. The lower appellate court found that the complainant failed to prove that Exts.P1 and P2 cheques were issued in discharge of an amount of Rs.75,000/- as claimed in the complaint. The lower appellate court also found that the case set up by the accused when questioned under Section 313 Cr. P.C. would show that the accused had borrowed only Rs.3,000/- from the complainant and that at the time of receipt of that amount, he had issued Ext.P1 cheque as security and that Ext.P2 cheque was issued by him on the representation made by the complainant that the first cheque was lost. That apart, the lower appellate court also found that the two cheques were issued on two different dates. It is to be noted that PW.1 had admitted before the trial court that "രണ്ടു cheques-o presentചെയ്യരുതെന്നു പറഞ്ഞു നീട്ടിക്ക ുകയായിരുന്നു. പണം തന്നതിന്റെ ഉറപ്പിലേക്ക് cheques

അല്ലാതെരേഖയൊന്നം എഴ ുതി വാങ്ങിയില്ല ." This would show that the amount has been received by the first respondent - accused on giving Ext.P1 chdque as security. It is also doubtful what prompted the first respondent to give two cheques on two different dates for the discharge of an amount of Rs.75,000/-. After considering the entire evidence adduced by the appellant - complainant and the case set up by the first respondent - accused, this Court is of the view that the finding entered by the lower appellate court is based on evidence and requires no interference.

6. The second ground urged before the lower appellate court was that there was no proper service of notice as contemplated under Section 138 of the Negotiable Instruments Act. The Apex Court, in the decision reported in **Rajesh Aggarwal v. Amit J. Bhalla (2001)1 S.C.C. 631**, had observed that the very purpose of service of notice under Section 138(b) of the Negotiable Instruments Act is to give an opportunity to the drawer to make the payment within 15 days. Further, as per the latest judgment of the Apex Court reported in **Alavi Haji, C.C. v. Palapetty Muhammed, 2007(3) I.L.R. (Kerala) 203**, service of notice shall not be considered as a pre-requirement for filing a complaint before the court. Even after service of summons from the court, the drawer would get 15 days time to pay the amount covered by the cheque. If so, the second ground on which the

lower appellate court set aside the judgment of the trial court cannot be legally accepted. However, the finding of the lower appellate court on the first ground itself would make it clear that the appellant - complainant failed to prove the case against the first respondent - accused.

Accordingly, the Crl. Appeal is dismissed.

(K.THANKAPPAN, JUDGE)

sp/

K.THANKAPPAN, J.

CRL.A. NO.307/2002

JUDGMENT

4TH SEPTEMBER, 2007